

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

LORAIN COUNTY METROPOLITAN PARK
DISTRICT,
BROWNING-FERRIS INDUSTRIES OF OHIO, INC.,
GOODRICH CORPORATION,
FORD MOTOR COMPANY,
GENERAL MOTORS CORPORATION, and
CHEVRON ENVIRONMENTAL MANAGEMENT
COMPANY, for itself and on behalf of KEWANEE
INDUSTRIES, INC.,

Defendants.

CIVIL ACTION NO.
1:08-CV-03026-AA

US EPA RECORDS CENTER REGION 5



439842

MEMORANDUM IN SUPPORT OF UNITED STATES'
UNOPPOSED MOTION FOR ENTRY OF AMENDMENT TO CONSENT DECREE

I. INTRODUCTION

Plaintiff United States of America, on behalf of the United States Environmental Protection Agency ("U.S. EPA"), respectfully requests that this Court enter the Amendment to Consent Decree ("Amendment") lodged with the Court on July 27, 2012. Upon approval by the Court, the Amendment will, subject to the specific terms set forth therein, add Westchester Fire Insurance Company as a signatory for purposes of taking over the obligations of Motors Liquidation Company (formerly known as General Motors Corporation) ("GM") under the Consent Decree entered by the Court on February 18, 2009

("Original Consent Decree"). The Original Consent Decree resolved claims of the United States under Sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 and 9607, against Settling Defendants, in connection with the Ford Road Industrial Landfill Superfund Site in Elyria, Ohio (the "Site"). For the reasons set forth below, the United States believes that the proposed Amendment is fair, reasonable and consistent with the goals of CERCLA. Accordingly, the United States respectfully requests that this Court sign and enter the Amendment as a final judgment. A signature line is provided for the Court on page 16 of the Amendment.

II. THE PROPOSED AMENDMENT TO CONSENT DECREE

On December 30, 2008, the United States filed a complaint in the above-referenced action, Civil Action No. 1:08--CV-03026 ("Complaint"). The Complaint sought the performance of studies and response work by the Settling Defendants to remedy conditions in connection with the release or threatened release of hazardous substances into the environment at the Site. The Complaint also sought to recover certain response costs incurred by U.S. EPA in overseeing the performance of studies and response work by the Settling Defendants.

Simultaneous with the filing of the Complaint, the United States lodged with this Court the Original Consent Decree, pursuant to which the Settling Defendants have been performing the \$3.4 million remedy specified in the Record of Decision for the Site, issued by U.S. EPA in September, 2006. In addition, Settling Defendants have been reimbursing response costs incurred by U.S. EPA in overseeing the response work.

In exchange for these commitments by Settling Defendants, the United States granted Settling Defendants covenants not to sue for certain claims under CERCLA. *See* Original Consent Decree, ¶ 84. These covenants not to sue are subject to certain conditions and reservations of rights. *Id.* ¶¶ 85-88. For example, the United States' covenant not to sue to Settling Defendants is "conditioned upon the satisfactory performance by Settling Defendants of their obligations under [the] Consent Decree." *Id.* ¶ 84. The United States' reservation of rights against Settling Defendants includes the ability to pursue the company if "unknown conditions or information" arise at the Site, as specified in the Original Consent Decree. *Id.* ¶¶ 85-86. The Original Consent Decree also grants the Settling Defendants protection from contribution actions or claims by third-parties for "matters addressed" in the Original Consent Decree. *Id.* ¶ 97.

On June 1, 2009, one of the Settling Defendants, GM, filed for bankruptcy and ceased performing under the Original Consent Decree. The proposed Amendment would add Westchester Fire Insurance Company as a signatory for purposes of taking over the obligations of GM under the Original Consent Decree. The Amendment specifies that GM's rights and obligations under the Original Consent Decree shall apply with equal force and effect to Westchester. Amendment, ¶ 2. The Amendment further specifies that Westchester shall make three types of payments until it reaches a cost "cap" of \$589.322. First, Westchester must reimburse the Settling Defendants for 50% of the expenses incurred since June 1, 2009 when GM ceased performance. Second, Westchester must make monthly payments reimbursing the Settling Defendants for 50% of the costs that they have incurred.

Finally, in the event of a work takeover by U.S. EPA, Westchester shall make accelerated payments in accordance with U.S. EPA's written instructions. Amendment, ¶¶ 6-18.

The Amendment was expressly conditioned on the United States seeking public comment on whether the settlement was appropriate. Amendment, ¶ 33. To the extent that the public comments indicated that the Amendment was improper or inadequate, the United States reserved the right to withdraw from the settlement. *Id.* On August 2, 2012, the United States Department of Justice published a Notice in the Federal Register of the lodging of the Consent Decree. 77 Fed. Reg. 46121 (August 2, 2012). The notice sought written public comments for a period of thirty days. The United States received no public comments.

III. STANDARD OF REVIEW FOR APPROVING A CONSENT DECREE

The well-settled standard of review applied to a proposed government settlement under CERCLA is whether the settlement is fair (from both procedural and substantive standpoints), reasonable and consistent with the statute's purposes. *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1424 (6th Cir. 1991) (internal quotation marks and citation omitted) ("AKZO"). "Protection of the public interest is the key consideration in assessing whether a decree is fair, reasonable and adequate." *AKZO*, 949 F.2d at 1435.

In examining a consent decree, however, it is not the duty of the court to determine "whether the settlement is one which the court itself might have fashioned, or consider[ed] as ideal. . . ." *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990). "In the absence of fraud or collusion, the trial court 'should be hesitant to substitute its own judgment for that of counsel.'" *Ruiz v. McKaskle*, 724 F.2d 1149, 1152 (5th Cir. 1984) (citations omitted); *accord AKZO*, 949 F.2d at 1435.

Finally, underlying these standards is the presumption in favor of voluntary settlements. *AKZO*, 949 F.2d at 1436; *Metro. Housing Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1013 (7th Cir. 1980) (the “law generally favors and encourages settlements”). “That presumption is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field.” *AKZO*, 949 F.2d at 1436 (citing *Cannons Eng'g*, 899 F.2d at 84). As demonstrated below, the Court should approve and enter the Amendment because it is fair, reasonable, consistent with CERCLA and in the public interest.

IV. THE AMENDMENT SHOULD BE APPROVED BECAUSE IT IS FAIR, REASONABLE AND CONSISTENT WITH CERCLA

A. The Amendment Is Procedurally and Substantively Fair

In assessing the “fairness” of a proposed consent decree, courts examine whether the decree is both procedurally and substantively fair. *United States v. Davis*, 261 F.3d 1, 23 (1st Cir. 2001); *Cannons Eng'g*, 899 F.2d at 86-87. “Procedural fairness requires that settlement negotiations take place at arm’s length.” *In re Tutu Water Wells CERCLA Litigation*, 326 F.3d 201, 207 (3d Cir. 2003). If the decree was the product of good faith, arm’s-length negotiations, it is presumptively valid. *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). “Substantive fairness involves concepts of corrective justice and accountability” *Davis*, 261 F.3d at 24; accord *Cannons Eng'g*, 899 F.2d at 87.

Here, the Amendment is procedurally fair because it was the result of good faith, arm’s-length bargaining between experienced counsel for both the United States and Settling Defendants. The Amendment is also substantively fair because it holds Settling Defendants

accountable for their past pollution at the Site. The Amendment has the valid consent and authorized signature from each party. For these reasons, the Amendment is clearly procedurally and substantively fair.

B. The Amendment Is Reasonable, Consistent With CERCLA's Primary Goals and Is in the Public Interest

The Amendment is consistent with CERCLA because it functions exactly as CERCLA's cost recovery scheme was intended to by ensuring that those responsible for the contamination pay the costs of the cleanup. *Cannons*, 899 F.2d at 90-91. Additionally, the Amendment comports with Congress' stated preference for settlement with responsible parties under CERCLA in order to avoid spending resources and time on litigation rather than on cleanup. This settlement is also in the public interest because time and resources are better devoted to "... CERCLA's real goal: the expeditious cleanup of hazardous waste sites." *United States v. Dibiase*, 45 F.3d 541, 546 (1st Cir. 1995). The settlement is therefore reasonable and its approval is consistent with CERCLA and in the public interest. *See, e.g., AZKO*, 949 F.2d at 1436 (discussing that settlement is reasonable and in the public interest, in light of likely protracted litigation if settlement were overturned, and consistent with goals of CERCLA to minimize litigation costs and expedite reimbursement of response costs to the government).

V. CONCLUSION

For the above reasons, the United States respectfully requests that the Court enter the proposed Amendment. No proposed order is attached because there is a signature block for the Court to execute on page 16 of the Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2012, a copy of the foregoing "United States' Unopposed Motion for Entry of Amendment to Consent Decree" and "Memorandum in Support of United States' Unopposed Motion for Entry of Amendment to Consent Decree" was served through the Court's electronic case filing system.

/s Robert W. Darnell
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